

REMARKS

Claims 19 and 26-28 were rejected in the Office Action ("the Action"). Claim 19 has been amended. Support for the amendment can be found throughout the specification and claims as originally filed, *inter alia*, page 2, lines 26-31. No new matter is presented by this amendment. Applicants respectfully request reconsideration of the pending claims in light of the following remarks.

Rejections Under 35 U.S.C. § 112

Claims 19 and 26-28 were rejected under 35 U.S.C. § 112, second paragraph as allegedly being indefinite. In particular, the Action alleges claim 19 is indefinite because it is unclear how the ascorbic acid correlates to the concentration of the antioxidant. Claim 19 has been amended to recite "from 0.1% to 3% by weight antioxidant(s) in addition to the about 30 to about 50 µg ascorbic acid per gram of pet food composition", thereby rendering this rejection moot. Applicants respectfully request the Examiner reconsider and withdraw this rejection.

Rejections Under 35 U.S.C. § 103(a)

Claims 19 and 26-28 were rejected under 35 U.S.C. § 103 as allegedly being unpatentable over Chandler (*In Practice*, 2002) ("Chandler"), in light of "Glutamine" The World's Healthiest Foods ("Glutamine") and Hamada, *et al.* (Journal of Chromatography A, 1998) ("Hamada"), and taken in view of Guilford (Journal of Small Animal Practice, 1994) ("Guilford") and Hickman (Clinical Techniques in Small Animal Practice, 1998) ("Hickman"). Applicants respectfully traverse the rejection for the following reasons.

The test that must be met for a reference or a combination of references to establish obviousness has not been satisfied in the instant matter. The MPEP states, in relevant part, the proper test for obviousness:

Office policy is to follow *Graham v. John Deere Co.* in the consideration and determination of obviousness under 35 U.S.C. 103 ...

[T]he four factual inquiries enunciated therein as a background for determining obviousness are as follows:

- (A) Determining the scope and contents of the prior art;
- (B) Ascertaining the differences between the prior art and the claims in issue;
- (C) Resolving the level of ordinary skill in the pertinent art; and
- (D) Evaluating evidence of secondary considerations.

MPEP § 2141.

When applying 35 U.S.C. § 103(a), the following tenets of patent law must be followed: 1) the claimed invention must be considered as a whole; 2) the references must be considered as a whole; 3) the references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention; and 4) reasonable expectation of success is the standard with which obviousness is determined (MPEP § 2141 II).

Claim 19 recites “[a] method for treating diarrhea in a cat suffering from inflammatory bowel disease comprising feeding said cat a diet comprising on a dry weight basis: ... from 4% to 6% by weight crude fat.”

Chandler discusses various dietary modifications which may be beneficial in the management of gastrointestinal disease in dogs and cats. Chandler does not disclose a method for treating diarrhea in a cat suffering from inflammatory bowel disease comprising feeding the cat a diet comprising the composition recited in the claims. In particular, Chandler does not disclose a diet comprising from 4% to 6% by weight crude fat as required by the claims. The Action does not address this deficiency in Chandler. A previous Office Action of February 6, 2009 stated, “Chandler disclose fat levels in the diet should be approximately 12-22%; however fat levels of >10% are common in low calorie diets (See Chandler, paragraph spanning pages 530-531); these values, especially >10% fat is considered to read on ‘about 4 to 6% crude fat’.” Office Action, February 6, 2009 at page 7. Thus, the Office Action of February 6, 2009 acknowledged that Chandler discloses fat levels greater than 10%, which is outside the weight range of crude fat recited in the claims. In order to support an alleged case of obviousness, the Office Action of February 6, 2009 presented a broad interpretation to the word “about”. Applicants respectfully disagree with this expansive interpretation of the word “about”. Nonetheless, applicants amended the claims to delete the word “about” in the May 6, 2009 response. Thus, as of the May 6, 2009 response, claim 19

requires that the composition comprises “from 4% to 6% by weight crude fat”, which is not disclosed by Chandler and not addressed by the Action.

Glutamine, Hamada, Guilford, and Hickman do not cure this deficiency in Chandler. Indeed, the Action does not rely on these four references to cure this deficiency in Chandler, but rather the Action relies on these four references for different propositions.

To the extent that the Action might rely on the argument that it would have been obvious to optimize the amount of crude fat recited in the claims to support the rejection, applicants respectfully submit that such an argument is not supported by fact or law. With respect to certain deficiencies in Chandler, the Action asserts “[t]hough Chandler is silent on the precise amounts of glutamine, fermentable fibers, omega fatty acids, antioxidants, including vitamin C (ascorbic acid), and glutamine, it would have been obvious to a person of ordinary skill in the art to experiment with varying amounts, within pharmaceutical ranges, of each ingredient to optimize the treatment potential of the diet.” Action at 5. The Action states “[w]here the general conditions of a claim are disclosed by the prior art it is not inventive to discover the optimum or workable ranges by routine experimentation. See *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).” Action at page 5.

MPEP 2144.05 discusses the patentability analysis with respect to the obviousness of overlapping ranges and optimization of ranges. As illustrated by the cases discussed in that section of MPEP, to support a *prima facie* case of obviousness for a range, the range in a reference must overlap or abut a claimed range. For example, in *In re Peterson*, the prior art ranges overlapped the claimed ranges, which supported the *prima facie* case of obviousness. In the present application, Chandler does not disclose the claimed range of crude fat, does not overlap the claimed range, and does not abut the claimed range. Thus, there are no overlapping ranges to support a *prima facie* case of obviousness.

In another case, *In re Woodruff*, a *prima facie* case was established apparently because the range in the prior art abutted the claimed range. In the present application, Chandler does not disclose a concentration of crude fat that abuts the

claimed range. Thus, there are no abutting ranges to support a *prima facie* case of obviousness.

In yet another case, *In re Aller*, process conditions were disclosed by the cited references. The claimed conditions were found to be an optimization of the process conditions in the cited references. Here Chandler does not disclose a concentration of crude fat that encompasses the claimed range of crude fat. Without this disclosure there cannot be an optimization of this condition. Thus, there is no disclosure of the claimed range to support a *prima facie* case of obviousness.

Moreover, the decision of *In re Aller* was severely limited in a subsequent case, *In re Antonie*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977). The CCPA in *In re Antonie* limited *In re Aller*, and found exceptions to the broad proposition that it would have been obvious to optimize certain variables. For example, the CCPA held it would not have been obvious to optimize a variable that is not disclosed in the prior art to be a result-effective variable. The CCPA also held that it would not have been obvious to optimize a variable when the results obtained would not have been expected. Chandler fails to suggest that the amount of crude fat is a result-effective variable such that a person having ordinary skill in the art would modify the amount to be less than that disclosed and preferred in Chandler.

For at least these reasons, a *prima facie* case of obviousness has not been established. Applicants therefore respectfully request that the Examiner reconsider and withdraw this rejection.

Conclusion

For the reasons discussed above, Applicants believe that the claims are in allowable state and respectfully request an early notice of allowance. The Examiner is invited to telephone the undersigned if that would be helpful to resolving any issues.

Respectfully submitted,

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